

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY

Call to Order: By **SEN. AL BISHOP**, on March 13, 2001 at 9:13 A.M., in Room 303 Capitol. **SEN. LORENTS GROSFIELD** returned to close the hearing.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 66, 3/9/2001; SR 20,
3/8/2001
Executive Action: SR 20

HEARING ON HB 66

Sponsor: REP. CHRISTOPHER HARRIS, HD 30, BOZEMAN

Proponents: Brenda Elais, State Auditor's Office
Jeff Weldon, Office Public Instruction
Pam Bucy, Attorney General's Office
Al Smith, MT Trial Lawyers Association

Opponents: None

Opening Statement by Sponsor:

REP. CHRISTOPHER HARRIS, HD 30, BOZEMAN, opened on HB 66, which created a commission to review the entire Montana Code, identifying laws that were inconsistent, illogical, out-of-date, obsolete, or simply unconstitutional. There were many examples he could provide of such laws currently on the books. He said the seven member commission would be appointed by the Governor, Attorney General, Auditor, President of the Senate, Speaker of the House, Office of Public Instruction, and Secretary of State all selecting one member. The House Judiciary committee amended the bill saying these would all be working members. He thought the preliminary work of the commission could be extremely beneficial; all trade associations (Bar Association, U of M Law School) would all be asked to go through the code to identify or nominate candidates for the laws that needed to be considered. He provided a few examples of code that should be stricken. He thought the commission could get into some controversial areas, and those would fall at the end of the spectrum. He noted the limit of their power was in recommending a law for repeal or amendment. The bulk of the work included tedious tasks of identifying the illogical, inconsistent, antiquated laws and identifying them. He emphasized it was different than the Code Commissioner's job in that the Commissioner looked for grammar, numerical order, and was more of a simple housekeeping job. The Code Commissioner's work would not be duplicated by the commission. The commission would review each statute to see if they met the test. He urged consideration and mentioned in the Winslow case, it established a law written in 1905, even though never used, was still valid. According the Supreme Court, the legislature had an intent when they left the law on the books. It indicated that the law had a purpose. He begged to differ, believing that the commission should go to work to find out which statutes needed to be removed. The legislature would have the opportunity to review their work to decide if a statute should remain, or if it could be removed. He figured that individual bills would be introduced to address the statutes title by title. He emphasized that it would save money, time, and energy in the

long run because it would allow the legislature to consider bigger issues instead of the little clean-up bills.

Proponents' Testimony:

Brenda Elais, State Auditor's Office, noted that there appeared to be illogical and inconsistent laws. She mentioned the Insurance Code, Title 33, would benefit from a review as proposed in the statute. She felt it was a worthwhile effort.

Jeff Weldon, Office Public Instruction, said it was a good government bill. He had observed that previous interim committees had been established to do similar work, but none of them had attempted such a broad approach. He suggested that entire chapters could be exempt from their consideration. School finance was a possible subject of an interim committee and therefore could be exempt to avoid duplication. The Office of Public Instruction attempted to put forth clean-up bills every session, but generally those bills addressed the issues that were most pertinent and most important at the time. Frankly though, the agencies did not have time to review the entire Code section under their responsibility to find these sorts of things.

Pam Bucy, Attorney General's Office, supported the bill because it was a good government bill. They felt the small fiscal note was a small price to pay for the potential in a decrease in litigation after an in-depth review of the Codes.

Al Smith, MT Trial Lawyers Association, noted this bill could appear to be detrimental to what they did, because very often they did have appeals based on inconsistent, unintelligible statutes. The bottom line, however, was that all Montanans could benefit from consistent, intelligible statutes.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. DUANE GRIMES asked if the bill implied illogical, inconsistent laws were being passed. **REP. HARRIS** replied no, but laws passed today could be considered illogical or obsolete in 90 years.

SEN. GRIMES questioned if the interim committee of Law, Justice, and Indian Affairs could consider these issues. He was wondering if there was another mechanism. **REP. HARRIS** responded that it had been suggested. He suggested that the commission would meet

approximately 12 times over the 18 month period. The meetings would be working sessions in reviewing the nominations from the U of M Law School and the various associations. They would determine if the law was illogical enough to recommend to the legislature for consideration of removal or amendment. He agreed it could be tedious work, but some would relish serving on such a commission. It was important work. He felt the interim committee had bigger policy issues to address and already had a full slate.

SEN. JERRY O'NEIL asked if the Code Commissioner ever sent bills for consideration. **REP. HARRIS** looked through the Code Commissioner bill when it went through the session and said it looked bland. It was essentially grammar changes and did not tackle the issues that could be inconsistent or could be unconstitutional. He felt it made sense to have a seven member commission who would devote the intellectual resources necessary to focus on what was inconsistent, illogical, and obsolete. He didn't think the Code Commissioner couldn't do it, but it was not the job of the Code Commissioner. He felt the Code Commissioner position would have to be expanded and the duties re-written to handle this additional work. Even then, he felt that the task required seven people to offer differing viewpoints.

SEN. MIKE HALLIGAN had a concern with the fiscal note. In the past, six or seven staff attorneys were part of a commission and it had support staff. This statute didn't require that. He wondered if the commission could accomplish its task without that support. **REP. HARRIS** said he had considered that and felt it could be done. The officials appointing members to the commission would understand that these had to be working people. In some cases, they could be lawyers from the staff and in other cases, they could be retired judges. It was going to be a working position and not one that depended heavily on staff. He acknowledged that the Legislative Services staff would be useful because they knew their areas of the code very well. They would be asked to nominate the various codes to be considered by the commission. The basic work of the commission would be to review the nominations and make judgements about them.

SEN. O'NEIL clarified that the commission would go for two years. **REP. HARRIS** said 18 months was specified so that the report could be considered by the next session.

SEN. O'NEIL noted that the fiscal note only requested one year of funding. He said that maybe it would fall within one fiscal year. **REP. HARRIS** referred to the fiscal note that indicated the years of operation.

SEN. O'NEIL argued that spanned two fiscal years. **REP. HARRIS** said the total cost was as outlined. The assumption was that 18 months of work would cost \$10,578.

Closing by Sponsor:

REP. HARRIS closed on HB 66. He felt it was worth doing, the commission would be enthusiastic about their job, and it could be accomplished in the 18 month period. If the committee wanted, it could be stretched out over a four-year period, but frankly, when looking for examples, he felt it was a manageable task. It would take work and intelligent commission members. He reiterated that the Winslow case stated that if the legislature left a law on the books, it assumed there was an intent in keeping that law, no matter how old, how illogical, or how antiquated. The result of that could be litigation and some of it was unnecessary and expensive for the taxpayers of Montana. It would be a cost-effective measure.

{Tape : 1; Side : B}

HEARING ON SR 20

Sponsor: **SEN. FRED THOMAS, SD 31, STEVENSVILLE**

Proponents: **Judy Martz, Governor**
Karla Gray, Chief Justice, MT Supreme Court
SEN. TOM BECK, President of the Senate
Ed Eck, Dean of U of M School of Law
REP. GILDA CLANCY, HD 51
Bob Brown, Secretary of State
Peter Habein, President of MT Defense Trial
Lawyers Association
SEN. BILL TASH, SD 17
Don Allen, representing himself
Ed Bartlett, State Bar Association
Steven Ertelt, Right to Life
Julie Millam, Christian Coalition

Opponents: **None**

Opening Statement by Sponsor:

SEN. FRED THOMAS, SD 31, STEVENSVILLE, opened on SR 20, which was the confirmation of the appointment of Jim Rice to the Montana Supreme Court. He noted that he had attended undergraduate school with **Mr. Rice** at the University of Montana. He said **Mr. Rice** was immensely qualified to serve in this capacity. **Mr. Rice** and **SEN.**

THOMAS served together on U of M's student government's senate. Even then, **Mr. Rice** exhibited the right kind of values for Montana, whether they were the things expected of a good husband and father, or a good community leader. He exemplified those qualities in college. **SEN. THOMAS** was honored and pleased to present this resolution. Without any doubt or hesitation, **SEN. THOMAS** felt **Mr. Rice** was the right kind of person, right now, to be confirmed to the Montana Supreme Court.

Proponents' Testimony:

Judy Martz, Governor, provided her remarks in support of her nomination; **EXHIBIT(jus57a01)**.

Karla Gray, Chief Justice, MT Supreme Court, said it was traditional for the Chief Justice to provide moral and every other kind of support to a new nominee. She noted that it was 10 years ago when she was confirmed and it could be an unnerving process. She was happy to speak for the governor's nominee. She felt the list of applicants was one of the strongest lists she had seen for a judicial appointment. She said the short list for final selection was very strong and any choice would have been fine. However, she suggested the selection was particularly strong. She believed **Mr. Rice** had the legal background, the experience, and commitment to community activities, his family, and even to politics that made him a very well-rounded person who was well able to serve on the Court. **Mr. Rice** had given the best of himself to whatever endeavor was before him; whether it was his law practice, his service in the legislature, his commitment and time with his family, or on the campaign trail. She was convinced that he would bring that and apply it after a quick and successful transition from advocate to judge. She thought Montana would be well served.

SEN. TOM BECK, President of the Senate, touched on his personal experience with **Mr. Rice**. He felt **Mr. Rice** was one of the most honorable and family-orientated people during his legislative experience. He said **Mr. Rice** had a good grasp of the difference between executive, legislative, and judicial branches of government. **Mr. Rice** was not the type who wanted to go to the Supreme Court to make law, rather he wanted to test the Constitutionality of the laws that were passed. It was important to have someone on the Supreme Court who had legislative experience. The former Chief Justice Turnage was a former legislator also. It provided the prospective on how to keep the separation between the legislative and judicial branches of government. He hoped to see a 50 to nothing vote on the Senate floor in favor of **Mr. Rice's** nomination.

Ed Eck, Dean of U of M School of Law, had known **Mr. Rice** for 25 years, as an undergrad student and also as a law school student. His comments reflected **Mr. Rice's** student file, some comments from other faculty members when **Mr. Rice** was a student, and his own observations as a member of the State Bar and the Dean who worked with alumni of the School of Law. He noted the file was remarkable and the letters of recommendation were replete with favorable words: active volunteer in the community, hard working, devoted, very thorough scholar, honest, capable leader. The Dean when **Mr. Rice** was in school predicted that he would be a leader in any field he elected to devote himself to. While in law school, **Mr. Rice's** record was of an outstanding scholar. In addition, he was active in the intellectual life as well as the social life of the community. He was active in various service organizations, an intern for the Missoula City Attorney, and an intern for the Lewis and Clark County Attorney. In addition to the prosecution side, he balanced that with the Montana Defender Project representing prisoners in the post-conviction relief. While in law school, he was also a member of the national mute court team. His work on that team caused the present dean to nominate **Mr. Rice** to the prestigious order of barristers, to which he was elected. He read two letters by professors in the Law School during Mr. Rice's tenure: **EXHIBIT(jus57a02)**, from Professor William Corbett; **EXHIBIT(jus57a03)**, from Professor J. Martin Burke. **Mr. Eck** believed that **Mr. Rice** had deep respect for people who held differing viewpoints. The deep respect for others would mark him as a fair and even-handed jurist on the court. He thought the system of justice would be well served. Not everyone would agree with every decision he wrote, but everyone would be able to say **Mr. Rice** was fair, impartial, nonpartisan, he wrote scholarly opinions that the public could analyze, and as a result of his service, the public had an even greater respect for the system of justice.

REP. GILDA CLANCY, HD 51, said she was serving in **Mr. Rice's** former House seat place because he used to be the Representative in her district. She spoke of his family and said the entire family had utmost integrity.

Bob Brown, Secretary of State, said he and **Mr. Rice** served in the legislature together and would work together on bills that went from one house's Judiciary committee to the other. He felt that **Mr. Rice** was extremely competent and was a man of principle and integrity. **Mr. Rice** had goodwill, a good sense of humor, and would make an excellent Justice of the Supreme Court.

Peter Habein, President of MT Defense Trial Lawyers Association, said the members of the association looked to the Supreme Court and to the qualities they expected of the justices serving on

that court. They looked for four essential qualities: 1) no personal agenda that would use the court as a means to implement; 2) commitment to fairness in the application of the law; 3) respect for and where appropriate, deference to the decisions of the District Court; 4) defend zealously the importance of an independent and strong judiciary in the State of Montana. **Mr. Habein** researched **Mr. Rice** and found that he exemplified each of the four qualities.

SEN. BILL TASH, SD 17, said he served with **Mr. Rice** in the legislature when **Mr. Rice** was the Vice Chairman of the House Judiciary committee. **SEN. Tash** was a freshman and learned a lot from **Mr. Rice** about the legislative and legal processes.

Don Allen, representing himself, said he dealt with **Mr. Rice** from a lobbyist standpoint. **Mr. Rice** was one of those who stood out as being fair, he listened to everyone and made up his own mind. **Mr. Allen** gained a lot of respect for **Mr. Rice** and his ability to see through the issues. **Mr. Allen** felt **Mr. Rice** would be fair and would look at the issues in light of not trying to legislate through the court.

Ed Bartlett, State Bar Association, recommended and supported **Mr. Rice** as the next associate justice of the Montana Supreme Court.

{Tape : 2; Side : A}

Steven Ertelt, Right to Life, strongly supported **Mr. Rice's** confirmation because **Mr. Rice** epitomized everything that was good about Montana and its people. He was a consummate professional and had impeccable credentials as a former legislator and attorney. As a husband, father, friend, and citizen of Montana, **Mr. Rice** was the type of person everyone could look up to and admire.

Julie Millam, Christian Coalition, noted the word integrity had been used many times in the previous testimony. She felt his years as a legislator stood as a tribute to his support of families. **Mr. Rice** was the first sponsor for the "Harmful to Minor's" law to protect children from obscenity. He had protected the right of families in his voting on issues of taxation, education, and legislation that impacted Montana families.

Opponents' Testimony:

None

Remarks from Jim Rice:

Jim Rice was pleased to stand before the Senate Judiciary Committee. He remembered watching James Nelson stand to be confirmed to the Supreme Court and before that he watched Karla Gray be confirmed. He appreciated the opportunity to be confirmed and he wanted to make the most of it. He mentioned that he received a lasting lesson in justice from his high school history teacher. He learned about the publisher, Peter Zinger, who was thrown in prison for 8 months because he wrote against the Colonial Governor. Finally, a lawyer came to the publisher's defense and through that acquittal, established freedom of the press and freedom of speech. The attorney argued that justice should be based upon, not power and position, but on the truth. From then on, **Mr. Rice** had dedicated himself to the cause of justice. He had attempted to live out that ideal in a day-to-day fashion. **Mr. Rice** noted he had the privilege of being taught by some of the finest educators in the state of Montana: Richard Raider and Mike Malone. Together they wrote, *Montana: A Tale of Two Centuries*. J. Martin Burke and Jack Mudd influenced him. Dean Mudd taught him that with grace and reason, the law could accomplish so much more. He spoke of a professor who urged him to run for the legislature, but probably would have thought differently if she would have known he would rise in Republican leadership and kill some of Dorothy Eck's bills. He spoke of the leaders he worked with in his legislative tenure: Francis Bardanoue, Bob Marks, John Vincent, Jack Ramirez, Dorothy Bradley, John Mercer, Dennis Rehberg, Mark O'Keefe, Chet Blaylock, Matt Himsel, Jack Galt. Serving with these people taught him a great appreciation for the building and what went on: work, hope, and aspirations that everyone represented and tried to fulfill on behalf of their people. He acknowledged he wore a party label, but felt the record would reflect that he did not carry a partisan attitude. He worked with an open mind (fairness). He was open to all concerns and affiliations. He treated each person with dignity and respect, and considered their opinion as best he could. He thought those were important qualities for a judge to hold. He felt that was the reason why he received letters from Democrat and Republican colleagues during the public comment period of the nomination commission. He specifically pointed out the chairman of the Democratic party in his county during his time in the legislature also wrote a letter supporting his nomination. He noted that Justice Regnier and Justice Nelson were in attendance; not because he was special, but because the work he would undertake for the people of Montana was very critical. He hoped that the committee would find something about him that justified the governor's decision to appoint him and merited favorable consideration of the nomination.

He introduced his family. His absent fourth grade daughter Karissa; his wife Norine; oldest daughter Kassie, a senior at Capitol High; his middle daughter Katie, a sophomore at Capitol High; and his parents Shirley and Jim Rice Sr.

Questions from Committee Members and Responses:

SEN. STEVE DOHERTY said he appreciated **Mr. Rice's** honesty and integrity. He noted **Mr. Rice** was a Republican nominee for Attorney General, and wanted to know more about **Mr. Rice's** dedication to nonpartisanship. **JIM RICE, Supreme Court Justice nominee**, felt it was a very important issue. As a lawyer who approached the court on many occasions, he needed to think and the clients needed to think that the judges he approached would view the case without regard to political party affiliations. He had that experience during the larger part of his law career. He didn't feel that when he approached a judge, it would be held against him, or impart favor to him, because he was a Republican. He felt that was the right attitude to have. His role models were those who had gone before him. Most had moved gracefully from holding a partisan position into the court and acted in a nonpartisan way. The best example was John Sheehey who ran for Attorney General and lost, then was appointed by the Governor to the Supreme Court.

SEN. DOHERTY asked for **Mr. Rice's** opinion on the current court in administering justice in Montana. **Mr. Rice** said his personal opinion was that it was probably the most capable court in the history of the state. He held it in the highest regard and felt they did an excellent job. He didn't always agree with an opinion, but he would have to work hard to work up to their reputation and abilities.

SEN. DOHERTY asked about a philosophy of the law; state Constitution vs. federal Constitution. When interpreting sections of Constitutional law, **SEN. DOHERTY** wanted to know if the court would always be bound by the limits, boundaries, lines that the U.S. Supreme Court had drawn. Was the Montana Supreme Court free (should be encouraged, or discouraged) on determining where the lines were drawn based on the state Constitution. **Mr. Rice** replied that within the federal system of government (dual jurisdiction) that there was room for state Constitutions to be distinctly different. He thought the state Constitution was unique and represented the unique independence of Montanans. He believed in the rights of the states to control their own destiny as much as possible within the federal system. He didn't adopt a general view that the state Constitution needed to be interpreted in lock-step with the federal Constitution.

SEN. DOHERTY commented that other than the Bar Association and the Trial Lawyers, no one else ever testified in favor of a Supreme Court Justice. Roe vs. Wade dealt with zones of privacy, or penumbra of rights, and filtered out the broadly defined issues in the federal Constitution. In the Montana Constitution, there was a specific right of privacy and the Montana Supreme Court had interpreted that right in several decisions. He wanted to know **Mr. Rice's** view of the Montana Constitution's protections or language regarding the right to privacy. **Mr. Rice** said generally speaking, within the penumbra of restrictions faced as a candidate for Judicial office, justices were not allowed to take positions in regard to specific issues upon which they might rule. He spoke generally without interfering with those prohibitions. He thought there had been a lot of discussions over concerns about Roe vs. Wade that it was based upon implications. The justices found something in the Constitution that wasn't explicitly there. That was one basic criticism of Roe vs. Wade. He mentioned Article 2, Section 10 of the Montana Constitution, which explicitly set forth the rights of privacy to the citizens. He believed, in general terms, it was a specific basis for discussion and restriction upon government interference upon the personal autonomy of the citizens. What Roe vs. Wade may have lacked in the issue of privacy, the Montana Constitution did not lack. The exact nature how it would be interpreted from case to case would vary, but as a general proposition, whether the consequences of that were liked, it was in fact there, must be recognized, and must be enforced.

SEN. DOHERTY used the Latin term, stare decisis, the court's tendency or ability to change course, reverse decisions made on established law that had been either statutory, common, or Constitutional law. **SEN. DOHERTY** asked for **Mr. Rice's** opinion on stare decisis, and its use and role in the Montana Supreme Court. **Mr. Rice** believed that stare decisis or the rule that a person follow the law as it had been previously announced was fundamental to the system. It predicated consistency and stability so that citizens and the lawyers who advised them could predict with some degree of reasonable certainty what was and was not allowed. It was a very important doctrine. That did not mean it was absolute and it could not be absolute in its application. There were times when corrections needed to be made. It was almost a question of individual philosophy of the judges. The rule of the Supreme Court was, "changes should only be made when they were manifestly necessary". What "manifestly" meant was something that boiled down to the individual justice. His philosophy was that he believed in stare decisis, he believed in its importance, and would seek whenever possible to keep the rules as they were. Even if changing the rules might bring a better result. It was with an understanding that a change in the

law best came out of the branches of government in which public input was taken and public input was given. The legislature was the better body to change the law when it needed to be changed.

SEN. RIC HOLDEN said Eastern Montana was glad to see **Mr. Rice** as the nomination for the Supreme Court. He noted the Montana HOPE project had been listed on his resume and asked what **Mr. Rice's** involvement was with that project and what the project was.

Mr. Rice was delighted to explain that it was a non-profit charitable organization that was administered and run by the Montana Highway Patrol Officers. The function was to grant wishes to terminally or seriously ill children in the state. They raised money to provide such things as computers to bedridden children, or family vacations to Disneyland. His role was as their legal council, providing assistance as the organization had grown.

VICE CHAIRMAN DUANE GRIMES noted **Mr. Rice's** concern in the past with balancing family issues with public service. He said the legislature held many discussions about the workload facing the court system at all levels. He asked if **Mr. Rice** was fully aware of what awaited him. **Mr. Rice** responded he was anxious to assume the duties and go to work.

{Tape : 2; Side : B}

Closing by Sponsor:

SEN. FRED THOMAS closed on **SR 20**. He was impressed with the nominee and the host of distinguished proponents concurring with the nomination of the Governor. He also found it gratifying and dignifying that there were other Justices' present, as well as **Mr. Rice's** family. He said **Mr. Rice** was an honest man, had deep integrity, and was a man people could trust. He felt that trust was a key characteristic in a justice; one who was steady in his convictions. He felt **Mr. Rice** would present good, solid judgments based on the law. Citizens would be able to understand the laws. If the decisions made by the courts were based in the law, and lay people could understand it, then it indicated that the law really worked. He was humbled and honored to recommend **Jim Rice** for consideration.

Motion: **SEN. DOHERTY** moved that **SR 20 DO PASS**.

Discussion:

SEN. LORENTS GROSFIELD said he was sorry he missed most of the hearing because he was presenting a bill in House Judiciary. He appreciated **SEN. DOHERTY's** question about stare decisis, and he really appreciated **Mr. Rice's** response to that. He heartily

endorsed his confirmation based on that and his knowledge of him and his family, as well as his resume.

SEN. JERRY O'NEIL commented that he had been a strong critic of the Montana Judicial system for 25 years. Now, in his position of power to chastize and berate it, there was a candidate that was so good, he didn't have anything negative to say.

Vote: Motion **carried unanimously.**

ADJOURNMENT

Adjournment: 12:00 P.M.

SEN. LORENTS GROSFIELD, Chairman

ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT (jus57aad)